SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1967

No. 468

RAYMOND CHARLES SMITH,
Petitioner,

v.

THE STATE OF OREGON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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August 31, 1967.

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OPINION BELOW

The opinion of the court below is reported at 426 P2d 463 and is set out in the Appendix of the Petition.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction.

QUESTION PRESENTED

Respondent disputes that the question stated by the petitioner is presented by the facts or law of this case. Respondent offers instead the following:

Is the application of M'Naughten's Rule of criminal responsibility to this petitioner so egregious and inappropriate as to be violative of constitutional due process?

MANNER OF RAISING FEDERAL QUESTION

Respondent accepts petitioner's statement with one exception. Petitioner's motion in arrest of judgment founded on Eighth and Fourteenth Amendment grounds was deemed denied by operation of law because petitioner did not set the matter for a hearing before the expiration of 55 days pursuant to ORS 136.810[1] and ORS 17.615.[2]

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Oregon statutes to be tested against the Eighth and Fourteenth Amendments of the United States Constitution, set out by petitioner, are these:

> ORS 136.390. When the commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the same must be proved by the preponderance of the evidence.
>
> ORS 136.410. A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been incapable of knowing

1. ORS 136.810. "* * * The motion must be made within the time allowed to file a motion for a new trial * * *."

2. ORS 17.615. "* * * The motion shall be heard and determined by the court within 55 days from the time of the entry of judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied."

the wrongfulness of the act, forms no defense to a prosecution for committing the act.

STATEMENT OF THE CASE

In addition to the statement by petitioner, respondent sets out a narrative of the actual facts of the crime.

Petitioner lived with a 17-year-old girl, Nancy Seely, who had run away from home. Shortly after noon on July 5, 1965, petitioner asked the tenant of a neighboring apartment to call an ambulance. He said he had had a "drinking fight" with his "wife and hurt her." (R. 15.) He returned two more times and repeated his request (R. 16 and 17). He appeared to have been drinking but was not drunk (R. 23). There was blood on his shirt on the second visit (R. 29).

At the request of the neighbor, a nurse went to petitioner's apartment where the victim lay comatose. Petitioner was upset and excited at the victim's condition, but was otherwise quiet, polite (R. 62) and apparently sober (R. 54). He urged resuscitation and plasma for the victim, and explained that he had stabbed her (R. 59). The petitioner fled as soon as the police arrived and became visible (R. 51).

The victim died of two knife wounds (R. 234, 249). She also suffered extensive bruises, cuts and other in-

juries to her eye, mouth, neck, chin, shoulder, arm, thighs and scalp (R. 236-239). Her hyoid bone was torn apart, apparently due to choking by the hands (R. 244-245).

When the police informed petitioner that he was charged with murder, his response was, "She kept crowding me. She kept pushing, and she doesn't understand me." (R. 116.)

REASONS FOR DENYING THE WRIT

Briefly summarized, the state of the law of criminal responsibility in Oregon is this: A defendant urging a defense of insanity has the burden of proving insanity under M'Naughten's rule by a preponderance of the evidence (formerly by proof beyond reasonable doubt). Mental condition short of criminal insanity may be considered as to intent. The Irresistible Impulse test is not applicable. ORS 136.390 and ORS 136.410; *State v. Leland*, 190 Or 598, 227 P2d 785 (1951), affd sub nom *Leland v. Oregon*, 343 US 790 (1952).

In the *Leland* case the Supreme Court of the United States had occasion to review the statutory scheme of Oregon. While it neither approved or disapproved, the Court found the Oregon standard consistent with the demands of the Fourteenth Amendment in this language:

> "The science of psychiatrity has made tremendous strides since that test was laid down in M'Naughten's case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law." *Leland v. Oregon*, 343 US at 800.

Nothing since 1952 has affected the continuing applicability of the good sense of the *Leland* opinion. Petitioner's citations reflect experiment, ferment and change in certain jurisdictions. That is a healthy process, but it has not as yet produced a standard so compellingly sound that it would require this Court to mandate each state to apply it to the exclusion of any other standard.

It has been ably suggested that the various jurisdictions have over-conceptualized varying definitions of insanity; that the actual distinctions between M'Naughten, Durham, ALI, and the rest are differences of semantics, but not of substance; that the differences are of negligible value so long as the jury is exposed to a thorough exposition of defendant's mental state; that the jury will arrive at the same sound result regardless of the words in which the instruction is framed so long as that instruction comprehends the elements of cognition, volition and capacity to control conduct. *Pope v. United States*, 372 F2d 710, 735-736 (8th Cir. 1967).

The jury was presented a full and complete exposition of this petitioner's mental condition. A review of the facts and the psychiatric testimony reveal that petitioner has failed to make a persuasive case regardless of which formulation is applied. Insanity was clearly a defense of convenience. The facts of this particular case fall far short of the magnitude which would require this Court to reverse its clear-cut holding in *Leland v. Oregon, supra,* upon which the court of this and other states have firmly relied for 15 years.

Petitioner seeks unsuccessfully to portray himself as one so mentally ill as to demonstrate the gross injustice of the M'Naughten rule. A summary review of the expert testimony shows that image to be greatly magnified by self-interest. Not even petitioner's own psychiatrists support such an idea. Dr. Dixon, Jr., said, in sum, that although petitioner was able to premeditate and deliberate (R. 423-424), despite some paranoid tendencies (R. 409), petitioner was prone to act impulsively, particularly when drinking. Dr. Dixon concluded that he was so acting at the moment of the homicidal act (R. 421-422), without regard for right or wrong.

Dr. Jens testified similarly, but never stated a conclusion as to whether petitioner acted appreciatively or with knowledge of right and wrong.

The synthetic quality of petitioner's attempt to fashion criminal insanity where the facts do not support him, is reflected in his reassertion of the existence of the electroencephalographic "spike." Petitioner hopes to profit from the recital of scare-words, but the fact is that neither defense psychiatrist attached any relevant significance to the "spike" (R. 442, 479-480) despite counsel's efforts otherwise. That is not the sort of foundation upon which the Supreme Court should predicate a review of the law of insanity.

Testifying for the state, Dr. Newman of the Oregon State Hospital said that he found no evidence to suggest legal insanity (R. 533) and that petitioner was not mentally ill except for a depression probably related to petitioner's present legal difficulties (R. 535-537).

Dr. Simpson, a clinical psychologist at Oregon State Hospital, concluded from a battery of tests that petitioner was brighter than average, showed no organic or pathological impairment whatsoever and, although depressed, petitioner was not psychotic (R. 547-548, 554), that petitioner had a paranoid tendency not unusual among persons who are oriented to their surroundings (R. 549).

Petitioner's reference to partial delusion, i.e., that petitioner thought that he had caught Nancy Seely in bed with a Negro man, finds no support in the testi-

mony. Counsel may have desired to prove it, but he gave no evidence. To the contrary, there was evidence that petitioner was angered at Nancy Seely because she refused to obey petitioner's instructions to have intercourse with other men (R. 342-345).

The instructions given the jury reflect a standard definition of M'Naughten's Rule and, in addition, required them to consider petitioner's mental condition in determining questions of intent, malice, passion and deliberation. The latter idea is reflected in this instruction:

> "You are instructed that you are to take into consideration the defendant's mental condition or illness, if any, at the time alleged, including intoxication, any brain damage or injury thereto, if any, in determining whether such conditions in whole or in part deprived the defendant from having the requisite intent or malice or passion or whether he deliberated or premeditated." (Appendix to Petition 21.)

The facts were entirely before the jury under instructions which allowed them to construe them with good sense. They wisely rejected the offered but unsupported defense.

Petitioner's attempt to bring this case under the umbrella of *Robinson v. California*, 370 US 660 (1962), should fail. Petitioner is not being incarcerated for his mental illness; he was sentenced for murder.

In sum, respondent's position is twofold:

1) *Leland v. Oregon, supra,* is correct and dispositive. No formulation of criminal responsibility has yet achieved the degree of legal and psychiatric acceptance which would compel universal application of such standard in all jurisdictions as a matter of due process right.

2) If the Court feels that the time has come for re-examination of standards of criminal responsibility in light of the Eighth and Fourteenth Amendments, this case presents a totally inadequate record upon which to found the sort of momentous and wide-reaching policy decision which would be forthcoming from such an examination. When looking to the entire testimony of each psychiatrist rather than to a few bare phrases of some of them, it is clear that petitioner is simply not criminally insane in any commonly accepted sense.

CONCLUSION

Petitioner disapproves of the standard of criminal insanity which is approved by the legislature and Supreme Court of the State of Oregon. In its place he fails to suggest a standard so compelling to reason that due process compels its acceptance to the exclusion of all other rules. Until such a standard comes to the fore, there is no justification for countermanding the Legislature and Supreme Court of Oregon. The record further

fails to provide facts and psychiatric foundation which demonstrate the purported lack of wisdom of the Oregon test or the injustice of its application to petitioner. Were this Court to grant the petition for a writ of certiorari, it would be compelled to make a decision which would shake the criminal law by its four corners upon a record which provides negligible data. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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